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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS - - - - Petitioner

versus

KENTUCKY STATE BAR ASSOCIATION - Respondent

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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No. A-950

HAROLD D. STIVERS - - - - - - *Petitioner*

v.

KENTUCKY STATE BAR ASSOCIATION - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals (App. A of Petition) is reported at 475 S. W. 2d 900.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the existing Kentucky case law and canons of ethics regarding solicitation were sufficiently definite so that the imposition of sanctions against the petitioner would deprive him of substantive due process.

II. Whether the disciplinary proceedings by the Kentucky State Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law.

III. Whether the evidence supports the findings and judgment of the Court of Appeals of Kentucky.

RULES INVOLVED

Kentucky Rules of the Court of Appeals of Procedure in Disciplinary Cases

The pertinent provisions of Rules of the Court of Appeals, RCA 3.140, *et seq.*, are set forth in full in the Appendix hereto.

STATEMENT OF THE CASE

On September 26, 1969, a Charge was filed by the Kentucky State Bar Association against this petitioner, Harold D. Stivers. Said Charge alleged that on or about June 5, 1969, Mr. Stivers knowingly caused to be written and mailed a letter to one Mary L. Vertrees of Louisville, and others, for the purpose of solicitation, in direct violation of Canon 27 of the American Bar Association's Canons of Professional Ethics. A copy of this letter is reprinted in the text of the opinion below. In addition, it was alleged that these acts constituted unethical and unprofessional conduct; that the same were calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to the respondent-below in accordance with RCA 3.175.

On October 24, 1969, the respondent-below filed an answer denying the allegations of the Charge; and by way of affirmative defense, respondent-below stated that he relied on certain decisions of the Kentucky Court of Appeals in support of his acts. Respondent-below requested a complete bill of particulars pursuant to the provisions of RCA 3.190. Complainant promptly furnished respondent-below with said bill of particulars, including a copy of respondent-below's letter to Mary L. Vertrees decribed in the Charge.

A Trial Committee was appointed by appropriate orders and in conformity with RCA 3.190.

On February 4, 1970, respondent-below requested the president of the Kentucky State Bar Association, to appoint counsel for him pursuant to the provisions of RCA 3.210. In accordance with respondent-below's request, A. James Higgs, Jr., of Frankfort was appointed as counsel to represent respondent-below. A hearing previously set for February 16, 1970, was reset for June 1, 1970, to allow appointed counsel adequate time to prepare the case for the hearing. A hearing on all issues was held on June 1, 1970. On March 10, 1971, the Trial Committee tendered its written report to the Board of Governors. The Trial Committee found that the respondent-below's acts constituted unethical conduct. On March 19, 1971, by a roll call vote, the respondent-below was adjudged guilty as charged by a vote of 15-0. Upon a second roll call, by a vote of 13-2, it was recommended by the Board of Governors that the respondent-below be suspended from the practice of law for a period of three years.

On March 30, 1971, a rule on the findings and recommendations of the Board of Governors of the Kentucky State Bar Association was issued by the Court of Appeals for the respondent-below to show cause why said recommendation should not be enforced by appropriate orders of this Court. The respondent-below duly filed a response to said rule.

Both the petitioner, Stivers, and the respondent herein, Kentucky State Bar Association, thoroughly briefed this case and all issues before the Kentucky Court of Appeals.

The petitioner raised basically three points before the Court of Appeals. The first dealt solely with the evidence in the case. The second issue raised was the argument that he was denied substantive due process of law because Kentucky case law permitted or he had reasonable grounds for believing it permitted the sending of the letter involved. The third issue raised by the petitioner was that he was denied procedural due process by the manner in which proceedings of the Bar Association were conducted.

The Court of Appeals rendered its decision on November 19, 1971. See *Kentucky State Bar Association* v. *Stivers*, Ky., 475 S. W. 2d 900 (1971). The Court in its per curiam opinion reviewed extensively the testimony in the record and upon its own review of the entire record found that the charge was sustained by the evidence. The Court also held that the petitioner was not deprived of substantive due process. Finally, the Court ruled that the petitioner was not deprived of procedural due process because the opin-

ions and recommendation of the Board of Governors are merely advisory and the Court itself makes its own decisions based on the facts and evidence in the record.

The Court ordered that the petitioner, Harold Stivers, be suspended from the practice of law for one year. This suspension was 2 years less than the suspension recommended by the Board of Governors.

The petitioner then filed a petition for rehearing with the Court and the petition was denied. A Motion for Stay Pending Review of Certiorari, filed in this Court was granted pending the filing of a petition for a writ of certiorari.

ARGUMENT

The issues raised by the petitioner in his petition for certiorari concern the constitutionality of the procedures utilized by the Court of Appeals of Kentucky in disciplining a member of the Kentucky State Bar Association.

Each issue raised by the petitioner will be answered briefly after a short consideration of the general issues in the case at bar.

I.

The Decision Below Was Based on an Adequate and Independent Non-Federal Ground

The petitioner throughout the entire proceedings in this case raised primarily two constitutional issues. First, the petitioner asserted that he was denied substantive due process of law because he was subjected to

disciplinary proceedings for conduct which he believed was permissible under Kentucky law. He asserted that this lack of notice that his actions would constitute a punishable offense denied him substantive due process.

The Court of Appeals in its decision did not find it necessary to pass on the constitutional issue directly. The Court made a thorough and exhaustive review of the Canons and Kentucky case law and determined that the Kentucky law regarding solicitation was abundantly clear in its condemnation of solicitation. In fact, the Court, after reviewing all the case law, stated specifically:

> We reject out of hand the contention that the type of solicitation here involved was of such doubtful impropriety under the existing case law of this state that disciplinary sanctions against the respondent would deprive him of substantive due process guaranteed under the United States Constitution.

The Court, therefore, rested its decision solely on the basis of their interpretation of the Canons of Ethics and case law in the State of Kentucky.

The second constitutional issue raised by the petitioner in his brief before the Court of Appeals of Kentucky was whether or not the disciplinary proceedings by the Kentucky State Bar Association were conducted in such a way as to deny him rights of procedural due process.

Here again, the Court in its Opinion, clearly based its decision on independent and substantial non-federal grounds. The Court concluded that since under the

Rules of the Court of Appeals and Kentucky case law the findingsof the Trial Committee and the Board of Governors, were only advisory and since the Court itself made an independent examination of the factual and legal issues involved, and since the Court itself was the only body which could impose any disciplinary action, there was no denial of procedural due process.

The Court clearly stated this position in its Opinion:

> But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted.

The Court went on to point out:

> In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway.

It is equally clear that the Court did exercise its own judgment by the fact that it refused to follow the recommendations of the Board for a three year suspension and instead suspended the respondent for one year.

Both of these constitutional issues raised by petitioner were answered by Court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There was no federal issue to be decided since the sole basis on which to determine the validity of the petitioner's constitutional argu-

ments rested on the proper interpretation of Kentucky law.

The third issue raised by the petitioner in his brief before the Court of Appeals concerned the evidentiary findings made by the Trial Committee. This issue was clearly defined by the Court upon independent non-federal grounds. The Court held that the report and recommendations of the Trial Committee and Board were only advisory. The Court also pointed out:

> This means, of course, that in the end, this Court must be judge of the factual as well as legal issues and of the final action to be taken.

The Court in its role as fact finder specifically and unequivocally held:

> We are unanimous in the opinion that the charge is sustained by the weight of the evidence. . . .

The petitioner has requested this Court to grant a petition for certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals.

II.

Although Not Affecting the Merits of This Case But Because the Disciplinary Rules of the Court of Appeals Have Been Changed, the Issues Presented Here Will Not Arise Again in This State.

The issues presented by the petitioner in this case are not only based on factual determinations by the Court, but are now essentially moot questions. As the petitioner himself has pointed out in his brief at page 11:

> . . . . certain amendments to the rules of the Court, pertaining to Bar disciplinary cases, were made effective by Order of the Court, entered July 2, 1971. *These amendments eliminated, almost in their entirety, those provisions which the petitioner had argued in his Brief were objectionable, as being violative of his Fourteenth Amendment rights to procedural due process and fundamental fairness.* (Emphasis added.)

The petitioner throughout his brief has strenuously urged that the Court by the amendments effect on July 2, 1971, "tacitly recognized the validity of his arguments." *The Court did no such thing.* This case began with a charge being issued against the petitioner in September, 1969. At the time the decision of the Court of Appeals was delivered in November, 1971, the new rules had already been announced. The opinion clearly reflects that the Court was cognizant of the rule changes which had been put into effect. If there had been any denials of constitutional rights to the peti-

tioner, the Court would have been even more cognizant and aware of such, but there were none.

This same argument was raised by the petitioner-below in his petition for rehearing by the Court of Appeals. That petition was denied. The petitioner has attempted to latch on to these changes by alleging that the subsequent amendment of the rules indicates that the previous rules and procedures were unconstitutional. Such an argument carries little convincing weight, in view of the fact that the Court of Appeals specifically found that there were no constitutional violations of due process in these proceedings, and in view of the fact that the rules were amended prior to the decision being rendered in this case.

If, in fact, the Court had overlooked these changes or had felt that the previous procedures were unconstitutional, a petition for rehearing would have undoubtedly been granted. It was not.

III.

The Decision Below Is Correct and There Are No Justiciable Reasons for Granting the Writ

The petitioner in setting forth his reasons for granting the writ has set forth the following grounds:

I. The rules and procedures violated the Due Process Clause of the Fourteenth Amendment.

II. The Due Process Clause was violated by the insertion of additional charges in the brief of the Bar Association before the Court of Appeals.

III. The Court failed to give significance to the evidence introduced by the petitioner.

Each of these specific reasons will be briefly commented on, for the purpose of showing the correctness of the decision below.

Under the Rules of the Court of Appeals as they have existed in the past and as they are presently written, a framework has been set up by which complaints against members of the state bar association can be handled. The final authority in all bar disciplinary proceedings with respect to a determination of guilt and with regard to punishment is specifically and solely vested in the Kentucky Court of Appeals. All other stages in the processing of disciplinary actions are merely advisory, and the Court is free to make its own determinations with respect to both factual and legal issues. This is true because of the inherent power of the court to discipline members of the bar association.

Even a cursory examination of the Rules of the Court of Appeals reveals that constitutional safeguard throughout the entire proceedings. As the Court pointed out in its opinion, each stage is mainly a "screening device" by which a respondent may be finally acquitted but cannot be convicted.

The petitioner has asserted in his brief that due process requires that he should have been present at the Board meeting which authorized the charge to be filed, citing *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). Under the Rules, if a complaint is determined to be unfounded it can be declined even without an investigation, RCA 3.160. Where a complaint indicates that an attorney may be guilty of unprofessional

conduct an investigation may be made, RCA 3.140. The Rules, RCA 3.150 and RCA 3.170, specifically provide that investigations are to be prompt and that nothing connected with a disciplinary proceedings is to be made public.

Pursuant to Rule 3.180, the Board determines by a majority vote, whether a complaint should be tried, and if so, it prepares a charge, setting forth the facts allegedly constituting unprofessional conduct.

The charge, therefore, is really the initial step in a disciplinary proceeding. It involves neither a public proceedings nor an evidentiary or adjudicatory stage. Its sole function is to initiate subsequent formal proceedings, i.e., trial committee action, at which the defendant is granted all constitutional procedural rights. RCA 3.280. The whole purpose behind the procedural steps taken by the bar association is to "weed out" unfounded complaints. The facts in *Jenkins (supra)* are clearly distinguishable from the facts and procedures involved here. The issuance of a charge is not a fact finding procedure, but is rather a single formal step, taken in order to get the case before the Trial Committee which hears all the evidence presented on both sides and then determines its recommendations.

The stage of the proceeding in *Jenkins (supra)* was mostly akin to the Trial Committee proceedings involved herein. The Court was concerned in *Jenkins (supra)* with the stage in the proceedings where the Commission called witnesses to testify in a public hearing. The stage referred to in the present case is merely

the issuance of a charge. It involves no hearing, witnesses or testimony except to the extent that the Board determines that the complaint is not unfounded. The actual fact finding hearing is before the Trial Committee at which the defendant enjoys the full panoply of procedural safeguards.

Pursuant to RCA 3.190, there is complete impartiality by requiring that the three members of the Trial Committee be members of the House of Delegates, that they shall not be from the same judicial district as the respondent and that the chairman shall possess the qualifications and powers of a circuit judge under a commission from the Chief Justice of the Court of Appeals.

Under the duly adopted rules, the Trial Committee is in all respects the "adjudicator of fact." It is this Committee which is charged under the rules with hearing the evidence presented in the case and per RCA 3.380 shall state what "facts" were proven as well as its conclusions. The petitioner herein makes no allegation or suggestion that this stage of the proceeding was in any way "tainted" with any irregularity or unconstitutional mixing of functions. All constitutional safeguards are provided the respondent at this stage of the proceedings, including (a) the right to challenge the qualifications of any member of the Trial Committee, RCA 3.210, (b) the right to be represented by counsel, RCA 3.280, (c) right to a hearing, RCA 3.280, and (d) all rights afforded a party by the rules of Civil Procedure, including the right to introduce evidence, cross-examine witnesses, compel the attendance of witnesses, the right to remain silent, RCA 3.280.

The Trial Committee proceedings, therefore, are without question in conformity, compliance, and with complete regard for the respondent's rights to procedural due process. The respondent does not intimate or suggest that any evidence, reports, etc., were before the Trial Committee or that they were in any way influenced by any testimony not presented into evidence, all of which the respondent had a right to inspect and cross-examine. RCA 3.370 specifically provides that the proceedings shall be reported, and if the recommendation is other than a private reprimand then the proceedings shall be transcribed. It is the transcript of evidence at the Trial Committee hearing which provides the Court with the necessary information on which to base its decision as to disciplinary sanctions. They have before them the "evidence" that was in fact before the Trial Committee, all of which was subject to objections and cross-examination by the petitioner's counsel.

The rules provide a further step in which the Board of Governors considers the entire record. It may then decide whether the respondent is guilty or not guilty. It affords additional protection in that if the respondent is found not guilty, the Board's action is final. See RCA 3.390. If a respondent is guilty, the Board then votes on the degree of disciplinary action to be recommended. Other than a private reprimand, all other degrees of discipline are *only recommendations* to the Court. The rules specifically recognize that *any order recommending to the Court that disciplinary action be taken shall be advisory only.* See RCA 3.390.

The Court of Appeals then under its inherent and statutorily recognized powers ultimately passes to the question of whether or not the respondent is guilty of professional misconduct; and if so, the degree of punishment to be imposed. The Court of Appeals is the only body empowered to impose discipline other than a private reprimand.

The recitation of the procedure is extremely important in exposing two very basic points:

(1) The *Trial Committee is the adjudicator of fact* and they provide all the constitutional safeguards to the respondent and make a transcript of all the evidence, and

(2) The Court of Appeals is the *only* body which can or does officially impose any sanction or passes finally on the guilt or innocence of the attorney as well as the imposition of discipline.

Therefore, it is clear that the Board of Governors is acting only in an advisory capacity based on the evidence presented at the Trial Committee hearing. The Board of Governors is, in no way the adjudicator of *fact* and in no way renders any *final decision* in regard to sanctions. It is merely an advisory agent of the Court and as the name suggests, its advice may be freely rejected by the Court which it frequently has done, and which it in fact did in this case by reducing the suspension from a recommended three years to a one year suspension. It is certainly clear that "the Court" is the only one that will make the ultimate decision in all disciplinary cases. It is so cited in the case below.

The remaining two grounds cited by the petitioner are of little validity. The petitioner has asserted that additional charges were brought by counsel for the Bar Association in the brief filed before the Court of Appeals.

The petitioner in his brief before the Court of Appeals and indeed throughout the entire proceedings in this case attempted to justify the solicitation of business by citing Kentucky case law which he asserted gave him reasonable grounds to believe that the sending of the letter involved here was not unobjectionable or unprofessional conduct. Additional charges were not levied against the petitioner, rather the cases cited by the petitioner were merely analyzed and in fact distinguished. It is interesting to note that these cases were all originally cited by the petitioner in his brief. The entire argument regarding solicitation was undertaken for the purpose of showing that the state of the law in Kentucky was obviously clear so that the petitioner's argument with regard to his denial of notice and substantive due process were unfounded. The Court of Appeals in its decision, also reviewed the Kentucky law and Canons and agreed that there could not and was not a denial of substantive due process.

It is also worthy to note that this constitutional argument was not raised by the petitioner in his petition for rehearing before the Court of Appeals, and, therefore, should not be considered by the Court as a basis for granting certiorari now.

Finally, the petitioner once again attacks the weight which the Court gave to the evidence in this case. Even

a cursory examination of the Court's opinion in this case reveals that the Court considered all the factual and evidentiary matters in this case. If the Court gave little significance to the petitioner's evidence it was due to a lack of credibility of the evidence and not due to an oversight on the part of the Court. Here again, the petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the Court of Appeals and the weight and credibility are accorded to the evidence are not properly reviewable especially where the Court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

Respectfully submitted,

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